77-1664

IN THE

Supreme Court of the United States

October Term, 1977

LORENZO SHELTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Court of Appeals No. 77- 5223

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TABLE OF CONTENTS

AUTHORITIES CITED

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Petitioner, Lorenzo Shelton, by his attorney, Carl Ziemba, respectfully prays this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered March 31, 1978 in Docket No. 77-5223.

OPINION BELOW

The Opinion of the Court of Appeals is printed as Appendix A, *infra*. The Opinion is not yet officially reported.

JURISDICTION

The Judgment of the Court of Appeals was the Opinion. A petition for rehearing was denied by Order dated May 2, 1978; it is printed as Appendix B, *infra*.

Jurisdiction is conferred by 28 U.S.C. § 1254.

QUESTIONS PRESENTED

I

Was petitioner placed in double jeopardy where:

(1) petitioner and one LaCoursiere were charged in the first indictment as co-conspirators to violate the Hobbs Act but only petitioner was named as a defendant on a charge of conspiracy under 18 U.S.C. § 1951;

(2) and a jury was impaneled and sworn and heard testimony and the Government moved to dismiss because the district judge ruled that LaCoursere was an agent of the police and could not be a co-conspirator;

(3) and the Government secured a second indictment charging petitioner under 18 U.S.C. § 1951 with obtaining money under color of official right from the same LaCoursiere;

(4) and petitioner was convicted under the second indictment?

II

Does the Hobbs Act apply to a factual situation where:

(1) petitioner was employed by the housing commission of the City of Detroit but had nothing whatever to do with letting city contracts for repairs to public housing and had nothing to do with handling and accepting bids on contracts;

(2) LaCoursiere sought out petitioner and asked petitioner to help him submit low bids on repair contracts to public housing;

(3) LaCoursiere and petitioner agreed that LaCoursiere would pay petitioner a percentage of the profits made by LaCoursiere on contracts which he won as low-bidder;

(4) LaCoursiere paid petitioner sums of money on three occasions without LaCoursiere's being placed in fear or being threatened and without petitioner's withholding or threatening to withhold anything which he owed to LaCoursiere by virtue of his official position?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> '[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .'

18 U.S.C. § 1951 provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section . . . .
>
> * * *
>
> '(2) The term "extortion" means the obtaining or property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.'

STATEMENT OF FACTS

Under the first indictment, petitioner alone was charged as a defendant. LaCoursiere and Kettner were named co-conspirators of petitioner.

This indictment in one count charged a conspiracy under 18 U.S.C. § 1951 [*not* under 18 U.S.C. § 371] to obstruct commerce by extortion, consent having been induced under color of official right.

Petitioner went to trial on this first indictment. A jury was impaneled, sworn and it heard testimony. It developed from the testimony that Kettner just wasn't a co-conspirator under the terms of the indictment. It became known to petitioner during the trial for the first time that LaCoursiere was, during the entire period of the alleged conspiracy, a government agent. The district judge agreed with petitioner that LaCoursiere could not be a co-conspirator under these circumstances.

The Government's attorney saw that he had no case under the indictment. He moved the court to dismiss the indictment. The motion was granted.

The Government obtained a second indictment.

This second indictment charged petitioner in three counts with obtaining money under color of official right on three different occasions from the same LaCoursiere, who had been named petitioner's co-conspirator in the first indictment. The three occasions named in the three counts had been named as three overt acts of the conspiracy charged in the first indictment.

Prior to the trial on the second indictment, petitioner moved to dismiss the indictment on double jeopardy grounds [among others]. This motion was denied in the district court.

The case was tried to a jury.

Evidence adduced on trial reflected that petitioner was a maintenance coordinator in the operation section of the City of Detroit public housing commission. From time to time, contracts were let to the lowest bidder for repair work on various housing units of the commission. These contracts were let by the Purchasing Department. Petitioner had nothing whatever to do with the evaluation of bids or the letting of contracts.

LaCoursiere and Kettner met in jail. Kettner suggested to LaCoursiere that a mutually beneficial arrangement might be set up between LaCoursiere, Kettner and petitioner. Kettner arranged a meeting between LaCoursiere and petitioner. This arrangement followed: LaCoursiere had a home repair company. He wanted to get into the business of winning repair contracts from the City of Detroit. He didn't know how to bid on city repair contracts and he didn't know how to be the low bidder. Petitioner was to give LaCoursiere ideas on how to bid on

city contracts, what procedures to use and what lists to get on so that he might receive bid forms automatically. LaCoursiere had borrowed $100,000 from an uncle and wanted to put the money to work and he urged petitioner to give him enough information so that he might successfully bid on city repair contracts. It was agreed that petitioner would receive ten per cent of the net profit made on these contracts.

On the first occasion that money was paid to petitioner, LaCoursiere advanced to petitioner $250 when petitioner was in financial embarrassment. On the second occasion, petitioner borrowed $450 from LaCousiere. On the third occasion, LaCoursiere paid petitioner $55 which squared the parties to that point on the basis of the ten per cent agreement.

Petitioner did not testify; he adduced no evidence whatever. Petitioner made appropriate motion for acquittal which was denied.

The jury acquitted petitioner on the first count and convicted him on the other two counts.

REASONS FOR GRANTING THE WRIT

A. This case presents an important and novel question of double jeopardy.

Both the first indictment which charged conspiracy to extort and the second indictment which charged the substantive offense of extortion [both under color of official right] were laid under the Hobbs Act, 18 U.S.C. § 1951.

The first indictment charging conspiracy was *not* laid under 18 U.S.C. § 371.

18 U.S.C. § 1951 provides punishment for anyone who obstructs commerce:

(1) by robbery

(2) by extortion

(3) by attempts to rob

(4) by attempts to extort

(5) by conspiring to rob

(6) by conspiring to extort

(7) by threatening physical violence to a person in furtherance of a plan to rob

(8) by threatening physical violence to a person in furtherance of a plan to extort

(9) by threatening physical violence to property in furtherance of a plan to rob

(10) by threatening physical violence to property in furtherance of a plan to extort.

There is clear authority that Congress did not intend to create more than one offense, that Congress intended to enumerate different kinds of conduct as reflecting different modes of achieving the proscribed result, not separate and distinct offenses, and that the Government should have charged the 'conspiracy' and the 'substantive' modes in one indictment. *United States v Spears*, 449 F2d 946 (CA DC 1971); *United States v Uco Oil Co*, 546 F2d 833 (CA 9 1976); *Crain v United States*, 162 US 625 (1896).

It cannot be said that Congress intended to empower the Government to charge a person successively upon one set of facts, first with obstructing commerce by robbery; and failing that, second to charge him with obstructing commerce by extortion; and failing that, third to charge him with obstructing commerce by attempting to rob — and so on until the government achieves a conviction.

Petitioner urges to this Court that double jeopardy reposes in this situation:

(1) the Government came into court with the first indictment and told the court that LaCoursiere had conspired with petitioner to extort; that LaCoursiere was a *co-conspirator;* that LaCoursiere was a 'co-wrongdoer' with petitioner, his partner in crime.

(2) then, failing in that theory, the Government came into court with the second indictment and told the court that LaCoursiere was the *victim* of petitioner, that LaCoursiere was no longer the co-conspirator of petitioner, no longer his partner in crime, but the victim of petitioner's extortion.

It does not comport with our concepts of fair play to countenance the Government's bringing a second prosecution against petitioner upon the same facts upon an entirely different theory without explanation for the change in theory save that the Government's first prosecution was unsuccessful.

When the Government makes a violent change in theory from charging that LaCoursiere was petitioner's *partner* in crime to charging that LaCoursiere was petitioner's *victim* of crime, then petitioner seriously urges to this Court that the Government is violating the Double Jeopardy Clause guarantee

'that the State with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . .' *Green v United States*, 355 US 184, 187 (1957); *Ashe v Swenson*, 397 US 436, 450 (1970), Brennan, J, dissenting.

o o o

B. This case involves a dangerous and unwarranted application of the Hobbs Act.

The Hobbs Act was not meant to apply to a situation, even if corrupt, in which some person was not victimized.

Here, LaCoursiere was neither robbed nor extorted. No threats of any kind were made against him.

Petitioner did not withhold or threaten to withhold any service or ministerial act which by virtue of his office he was bound to render to LaCoursiere without extracting payment.

Petitioner committed no act nor withheld any act toward LaCoursiere which in any manner threatened financial loss to LaCoursiere.

The evidence in the case clearly supports the following propositions:

(1) petitioner had absolutely nothing to do with awarding contracts or distributing public money;

(2) LaCoursiere desired to legitimately bid on city contracts and he desired to be the lowest bidder;

(3) the City of Detroit desired to let its contracts at the lowest bid possible and in fact let bids to the lowest bidder;

(4) whatever contract LaCoursiere succeeded in winning he won by virtue of the fact that he was the lowest bidder on the contract and he was accepted by the city because he was the lowest bidder;

(5) no other contractor was prohibited from bidding on any contract and no other contractor was prevented from making a bid lower than did LaCoursiere except his own determination that making a lower bid was not in his interest;

(6) there was no evidence and no claim that the work performed by LaCoursiere on contracts awarded to him by the city was inferior or not up to specifications or that the city was in any manner defrauded or that the city lost any money or paid more on a contract won by LaCoursiere than the city would have paid otherwise;

(7) LaCoursiere had capital which he wanted to put to work to make money; LaCoursiere at some point decided that he could make money by doing work for the city but that he didn't know how to go about making bids on contracts let by the city; LaCoursiere approached petitioner with the proposition that petitioner would advise LaCoursiere how to bid and how to make a low bid; LaCoursiere benefited from petitioner's knowledge of contract bidding procedures and not from any office held by petitioner.

LaCoursiere 'hired' petitioner, not because of some 'office' petitioner held, but simply because petitioner had the background and the knowledge of procedures of bidding on city contracts to be able to advise LaCoursiere on how to make a low bid.

It was not a case of LaCoursiere's being required to pay 'more than would otherwise be required' (Appeals Opinion, App. A, p 22).

It was not a case of LaCoursiere's having to pay in order to remove an obstacle to his bidding on city contracts.

It was a case of LaCoursiere's being eager to pay for information which he would not otherwise have and which petition was not under any obligation of office to give him.

In short, there just wasn't any violation of the Hobbs Act.

CONCLUSION

It is respectfully urged to this Court that this case presents an important and novel question of double jeopardy; and that it presents a serious and unjustified extension of the reach of the Hobbs Act which bodes much mischief.

RELIEF SOUGHT

Petitioner respectfully prays this Court issue its Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: May 11, 1978

APPENDIX A

OPINION

(United States Court of Appeals
for the Sixth Circuit)

No. 77-5223

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

United States of America, Plaintiff-Appellee, v. Lorenzo Shelton, Defendant-Appellant.

(Decided and Filed March 31, 1978.)

Before: Phillips, Chief Judge, Edwards and Peck, Circuit Judges.

Edwards, Circuit Judge. Appellant was convicted in a jury trial before the United States District Court for the Eastern District of Michigan on an indictment charging violation of the Hobbs Act, 18 U.S.C. § 1951 (1976). He was sentenced to two years, with all but 90 days suspended.

His ably argued appeal presents two questions of some importance. First, was the constitutional prohibition against double jeopardy violated by the fact that appellant was first prosecuted unsuccessfully upon a charge of conspiring to violate the Hobbs Act and was subsequently prosecuted under the same Act for the substantive offense of extorting money "under color of official right"? Second, does the language of the Hobbs Act (and Congressional intent in adopting it) serve to confer federal jurisdiction over the facts of this case?

Both questions require reference to the language of the Hobbs Act, which is Section 1951 of Chapter 95 (entitled "Racketeering") of the Criminal Code which we reprint in full below.

Section 1951. Interference with commerce by threats of violence.—(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. § 1951 (1976).

THE DOUBLE JEOPARDY QUESTION

The definition of crime contained in § 1951(a) above is phrased in the disjunctive. Thus in adopting this statute, Congress sought to make it a crime both to affect commerce by "robbery or extortion" or by "conspir[ing] so to do."

On May 27, 1976, the U.S. Attorney's office indicted appellant (and two other named persons) for the crime of conspiring to obstruct interstate commerce by extorting money from one of them under color of appellant's public office. The jury was sworn and the trial began. The evidence which was disclosed concerning the activities of

the two other alleged coconspirators showed that one of them, Kettner, was involved in the conspiracy sought to be proved only up to a date in 1975. It also showed that during the alleged conspiracy the other named coconspirator, LaCoursiere, was cooperating with the Federal Bureau of Investigation. On these facts, at defendant's instance, the District Judge ruled that LaCoursiere could not be considered a coconspirator and that the proofs of conspiracy were limited to dates earlier than the dates of payment of money by LaCoursiere to appellant. These payments had been charged as overt acts in the conspiracy indictment.[1]

With these rulings confronting the government, the U.S. Attorney moved to dismiss the indictment and the court granted the motion. The second Hobbs Act indictment against appellant followed charging the substantive offense of extortion under color of official right.

There is, of course, no question but that jeopardy attached in the first trial. Appellant's contention is that the Hobbs Act indictments and trials constituted double jeopardy because the two indictments charged the same crime. We do not agree.

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[1] They are also the principal grounds for the subsequent Hobbs Act extortion indictment.

The fundamental rule concerning prosecution of two offenses was stated in *Blockburger* v. *United States*, where the Court said:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.
>
> *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).

Generally, of course, conspiracy to commit a crime and the substantive crime itself may be charged as separate offenses. *Iannelli* v. *United States*, 420 U.S. 770, 777, 785 n.17 (1975); *Pereira* v. *United States*, 347 U.S. 1, 11 (1954); *United States* v. *Mayes*, 512 F.2d 637, 652 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975); *United States* v. *Bradley*, 421 F.2d 924, 927 (6th Cir. 1970).

In *Pereira* v. *United States, supra*, Chief Justice Warren, writing the opinion for the Court, said:

> The petitioners alleged that their conviction on both the substantive counts and a conspiracy to commit the crimes charged in the substantive counts constitutes double jeopardy. It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. See *Pinkerton* v. *United States*, 328 U. S. 640, 643-644, and cases cited therein. Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy.
>
> *Pereira* v. *United States, supra* at 11.

In a very recent case the Supreme Court recanvassed the double jeopardy problem and quoted approvingly from *Iannelli* v. *United States, supra*:

> This test emphasizes the elements of the two crimes. "If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . ." *Iannelli* v. *United States*, 420 U.S. 770, 785 n. 17 (1975).
>
> If two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. See *In re Nielsen*, 131 U.S. 176, 187-188 (1889); cf. *Gavieres* v. *United States*, 220 U.S. 338 (1911).
>
> *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977).

See also Simpson v. *United States*, 46 U.S.L.W. 4159, 4160-61 (U.S. Feb. 28, 1978).

In our instant case the proofs required for the conspiracy indictment differed in two major aspects from those required to prove the substantive extortion indictment. The conspiracy charged required proof of Kettner's participation in the planning of the crime. The substantive extortion charge did not. On the other hand, the indictment for extorting money from LaCoursiere under color of official right required proof that money was extorted. No such testimony was legally required for the conspiracy indictment — although obviously the United States Attorney considered it a vital part of his contemplated argument to the jury.

We recognize that appellant contends, all of the above to the contrary notwithstanding, that he should still prevail on his double jeopardy argument under an "exception" stated in Wharton's Rule, 2 F. Wharton, Criminal Law 634 (7th ed. 1874). In *Iannelli* v. *United States, supra*, Justice Powell's opinion held that "Wharton's Rule does not rest on principles of double jeopardy." *Id.* at 782. On the contrary, the Court described the rule as a judicial presumption to be applied only in the absence of contrary legislative intent, where the charges involve the same parties and rely upon the same facts, and where the consequences of the crimes affect only the parties themselves.

Recognizing these principles, the District Judge in this case said:

> Conspiracy to obstruct commerce by extortion of payments for the award of repair contracts in Detroit does not affect only the parties to the conspiracy; such a conspiracy, if proved, victimizes the people of Detroit, the many contractors who might have competed more successfully for repair contracts had the method for awarding them been lawful, and the contractor who paid a premium for the award of the contracts. Thus, there is no reason to except the Hobbs Act from the "historical difference between the conspiracy and its end." [*Iannelli* v. *United States, supra* at 779.]

We agree.

We also note that in our judgment Congress clearly intended to make conspiracy to extort and the substantive crime of extortion two different offenses, since both 18 U.S.C. §§ 1951(a) and 1951(b) (2) (1976) are phrased in the alternative.

THE RACKETEERING ISSUE

Appellant also claims that "racketeering" is an element of any Hobbs Act crime, that "racketeering" was not charged in this indictment, and, hence, appellant's conviction is void. In this regard appellant relies upon this court's opinion in *United States* v. *Yokley*, 542 F.2d 300 (6th Cir. 1976), and the Ninth Circuit's majority opinion in *United States* v. *Culbert*, 548 F.2d 1355 (9th Cir.), *cert. granted*, — U.S. —, 98 S.Ct. 53 (1977) (argued January 11, 1978). This precise issue phrased as broadly as appellant phrases it in this case is now before the United States Supreme Court awaiting decision, but the two cases upon which appellant relies in this regard are readily distinguishable from our present case. Both *Yokley* and *Culbert* involved extortion by use of force or violence. This court's opinion in *Yokley* and the Ninth Circuit's opinion in *Culbert* not only relied upon the absence of "racketeering" in the crimes there dealt with, but also regarded the prosecutions undertaken in the two cases as invasions of state criminal law sovereignty which were unintended by Congress.

The facts in our instant case are much closer to this court's decision in *United States* v. *Harding*, 563 F.2d 299 (6th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3526 (Feb. 21, 1978). In *Harding* the court distinguished *Yokley* by

pointing to the common law history of extortion. At common law the crime of extortion was defined as the corrupt taking of money by a public official "under color of official right." It seems clear to us that Congress had this concept of "racketeering" specifically in mind in adopting the Hobbs Act. In that sense the crime of extortion of money "under color of official right" was another and more legalistic way of describing "racketeering." In this respect we note that in *United States* v. *Nardello*, 393 U.S. 286 (1969), the Supreme Court in Chief Justice Warren's opinion discussed the meaning of extortion in the Hobbs Act and stated:

> At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion. In many States, however, the crime of extortion has been statutorily expanded to include acts by private individuals under which property is obtained by means of force, fear, or threats.
>
> *United States* v. *Nardello*, *supra* at 289 (footnote omitted).

See also United States v. *Staszuk*, 517 F.2d 53 (7th Cir. 1974) (en banc) (Stevens, J.) (adopting by reference the panel opinion at 502 F.2d 875, 878), *cert denied*, 423 U.S. 837 (1975); *United States* v. *Crowley*, 504 F.2d 992, 994-95 (7th Cir. 1974); *United States* v. *Braasch*, 505 F.2d 139, 151-53 & n.8 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

Under the circumstances recited above, we do not believe that either Supreme Court precedent or precedent in this court and the courts of appeals generally requires reversal of this case because the word "racketeering" was not employed in either the indictment or the charge.

OTHER ISSUES

Appellant also appears to contend that this was a victimless crime and that the money paid was freely rather than unwillingly paid and that on these grounds, appellant should be entitled to reversal.

As we have already pointed out in discussing the first issue, the District Judge found, and we agree, that the victims of this crime potentially include the people of Detroit who were deprived of the proper use of public funds, as well as the contractor who paid more than would otherwise be required, and the contractors who competed unsuccessfully.

If appellant's argument as to this issue is intended also to suggest that the crime should not be punished because it is de minimis, the answer must be that a little tolerated corruption can expand rapidly into great corruption.

Additionally, appellant claims that there was no unwilling victim. We note, however, that the District Judge gave a charge which specifically excluded the passive acceptance of a bribe as grounds for conviction:

> Extortion under "color of official right" means that property was unlawfully obtained from another person by a public officer, under the color

> of his office, and the property so obtained was not due and owing to the public officer, nor was the property due and owing to the office he represented. This type of extortion by a public officer does not require proof of any specific threats or the use of fear. It is required, however, that the public official be the initiator or inducer of the obtaining of the money or property. It is this requirment of inducing or initiating by the action or inaction of the defendant that distinguishes this crime from bribery. Before you can convict the defendant, you must believe beyond a reasonable doubt that he in some manner induced or initiated a transaction resulting in the payment of money to him as charged in the Indictment.

The jury's finding of guilt must be read as representing the jury's belief that appellant did induce or initiate the transaction as to which he was found guilty.

We have read the entire Appendix and find therein ample evidence from which the jury could properly have reached this conclusion.

Finding no other material issue presented and no prejudicial error in this record, we affirm the judgment of conviction.

APPENDIX B

ORDER

(United States Court of Appeals
for the Sixth Circuit)

No. 77-5223

(Filed May 2, 1978)

United States of America, Plaintiff-Appellee, vs. Lorenzo Shelton, Defendant-Appellant.

Before: PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges.

On receipt and consideration of a petition for rehearing in the above-styled case; and

Noting therein no substantial arguments which had not been carefully considered by this panel in advance of issuance of the court's opinion,

Said motion is hereby denied.

Entered by order of the Court
John P. Hehman, Clerk

By: /s/ Grace Keller
Chief Deputy